

APPEAL NO. 010723

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 14, 2001. With regard to the issues before him, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 11th and 12th quarters and "has not permanently lost entitlement to [SIBs]." (Section 408.146(c) refers to "any additional income benefits" not just SIBs.)

The appellant (carrier) appeals, citing numerous older Appeals Panel decisions and relying heavily on the fact that two other hearing officers have found the claimant not entitled to SIBs in prior quarters and that those decisions were affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 002126, decided October 24, 2000 (for the eighth and ninth quarters), and Texas Workers' Compensation Commission Appeal No. 002821, decided January 17, 2001 (for the tenth quarter). The claimant responds, urging affirmance.

DECISION

Affirmed.

Sections 408.142 and 408.143 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and regulatory requirements for SIBs. At issue in this case is whether the good faith job search requirement has been met.

The parties stipulated that the qualifying period for the 11th quarter was from August 29 to November 27, 2000, with the qualifying period for the 12th quarter being from November 28, 2000, to February 26, 2001. The carrier appealed the hearing officer's decision on the basis that the claimant did have some ability to work and, having made no job searches, was not entitled to SIBs for the 11th quarter and therefore has lost permanent entitlement to further income benefits having been determined not to be entitled to SIBs for the eighth, ninth, and tenth quarters. (See Appeal Nos. 002126 and 002821, *supra*.) The carrier specifically argues that the Appeals Panel in those cases "found that as a matter of law, these medical records [in those cases] were insufficient to prove the Claimant's case." We disagree. In those cases, we merely affirmed the hearing officer's decision, stating that the hearing officer is the sole judge of the weight and credibility of the evidence, citing Section 410.165(a) and Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The claimant, who has had two spinal surgeries, contends that she has a total inability to work in any capacity. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

In this case, the hearing officer, after considering all the evidence, made a finding that during the qualifying periods, the claimant "had no ability to seek employment or work." With regard to a narrative which specifically explains how the injury causes a total inability to work, the hearing officer cites Dr. E's report of February 16, 2001 (close to the end of the 12th quarter qualifying period), which references his prior treatment of the claimant, and states:

This lady has had multiple surgical procedures performed on her low back and is essentially a lumbar cripple. She spends some time each day in a reclining position. She walks with the assistance of a cane.

[Claimant] requires a considerable amount of pain medication and when the medication is taken, it is necessary for her to lie down awhile in order to get relief. She should not attempt to drive an automobile or try other activities during the times she is taking the medications. This would include a few hours each day, particularly in the middle of the day. She also requires medications in the evenings and overnight.

Some question arose as what kind of work-type activities [claimant] could perform. I have my doubts that [claimant] can perform any useful employment activities.

In fact, I have been concerned that she may need to be placed in a nursing home on a long term basis.

As a record which shows the claimant is able to return to work, the carrier cites a report from Dr. D dated February 8, 1999 (some 18 months prior to the beginning of the 11th quarter qualifying period), which states that the claimant "could tolerate sedentary work activity providing that this was flexible." The claimant testified that her condition has gotten worse since February 1999, and a report dated October 26, 1999, from Dr. M seems to confirm that contention. The hearing officer found that Dr. D's report was too remote in time and was contradicted by reports of Dr. E and Dr. M which were much closer to the qualifying periods at issue.

The carrier argues that the "only thing that has changed from the 8th quarter to the 11th quarter concerning Claimant's medical records is the hearing officer." We disagree and point out that in the eighth quarter, Dr. D's report was fairly current, whereas in this case, the hearing officer found that Dr. D's report was out of date and that Dr. E's and Dr. M's reports were more current. We also disagree that the records were exactly the same as in prior quarters, noting Dr. E's February 16, 2001, report (as well as a report of October 3, 2000). Whether these reports explain how the claimant is unable to perform any type of work in any capacity is a matter for the hearing officer to resolve. In cases such as this, it would behoove the parties to keep their respective medical evidence current. The claimant has done so, whereas the carrier continues to rely on medical reports over one and one-half years old.

We find the hearing officer's decision to be supported by the evidence, addressing the requirements of Rule 130.102(d)(4) and to be not against the great weight and preponderance of the evidence.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge